



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08346/2017

THE IMMIGRATION ACTS

Heard at Field House
On 20 February 2019

Decision & Reasons Promulgated
On 08 March 2019

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR SUMIT SUDAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Vencatachellum of Counsel, instructed by Adam Bernard
Solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India appealing against the decision of the respondent who, on 3rd October 2017, refused to grant his application for a permanent residence card as confirmation of his right to reside in the United Kingdom.
2. By way of background the appellant was married to [IS] a citizen of Lithuania. He entered into the United Kingdom in July 2005 and was issued with an EEA family permit on 18th May 2012 following his marriage to [IS] an EEA national.

3. Seemingly she has worked as a care assistant from September 2009 until August 2016 when she went on maternity leave.
4. Proceedings to end the marriage were legally instituted on 14th September 2016. They lived together until 15th March 2016. There are court proceedings in relation to a non-molestation injunction that is lodged against him. The decree absolute of divorce is yet to be granted.
5. The terms of the refusal decision are instructive in this appeal, that being a decision of 3rd October 2017. Reasons for refusal was on a limited basis namely:-

“You have failed to provide a valid passport/ID card, as confirmation of your sponsor’s identity, in support of your application. You have only provided a photocopy of a Lithuanian passport []. You have therefore not satisfied the Secretary of State that you are the former family member of an EEA or Swiss national.

The Regulations state that all applications submitted by a non-EEA national after 1st February 2017 must be accompanied or joined by a valid national identity card or passport in the name of that EEA national.

although it is noted that you are divorced from your sponsor, you have failed to provide any evidence that you have in any way attempted to obtain the ID document required for this application. As such this department is unable to establish that you have exhausted all routes to demonstrate that you have are a former family member of an EEA national who has retained the right of residence in the United Kingdom”.

6. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Wyman on 22nd August 2018. The respondent was not represented on that occasion.
7. The Judge noted the particular reason for the refusal.
8. It was submitted by Counsel that by reason of Regulation 42 of the 2016 EEA Regulations it was open to the respondent to waive the requirements, where alternative evidence had been presented, when there were circumstances beyond the appellant’s control preventing him from obtaining the original documentation.
9. The Judge noted the occupation order and non-molestation order issued by the Family Court at East London dated 27th October 2016. It was also noted that the respondent did not contest the making of the occupation order and non-molestation order made on 29th July 2016 which continued until 26th October 2017.
10. The key reason why the application was refused is that the appellant had not taken all steps to obtain the relevant documentation. The Judge went on at paragraph 40 to say

“It is clear that both the appellant and his ex-wife were represented by solicitors during the ongoing non-molestation and during proceeding. Whilst I accept that the appellant is unable to contact his ex-wife directly, his solicitors could have written to his ex-wife’s solicitors requesting her passport or identity card for the purposes of immigration proceedings. However, they have failed to do so.

The solicitors for [IS] could have sent directly to the Home Office her passport if she did not want the appellant to have this document or alternatively the solicitors could have sent it to Mr Sudan’s solicitors. However, no attempts have been undertaken in this regard”.

11. Challenge is made to the comments made by the Judge at paragraph 38 of the determination. There is a considerable merit in that challenge. It would seem to be quite irrelevant to the issue under consideration whether or not the appellant had been aggressive and whether or not he was at fault with the behaviour towards his ex-wife. Essentially the grounds contend that the appellant had indeed taken all reasonable steps given the fact of the molestation order.
12. Leave to appeal to the Upper Tribunal was granted on that basis that the Judge failed to take into consideration all the evidence, including the difficulties which the appellant would practically face in contacting his wife.
13. Thus the matter comes before me to determine the issue. Ms Vencatachellum submits that in this case a common-sense view should be taken of the totality of the evidence that has been presented. The appellant has produced his passport in which the residence card permission is enclosed. He would not have been granted that had his wife not been a EEA national. He produced the photocopy of her passport and it was certainly within the ability of the respondent to verify her particulars and details. There seems to be no challenge to the fact that she was exercising treaty rights for the requisite period and therefore it would not be difficult for the authorities to check her details.
14. As the refusal decision makes it clear there is really a two-stage process. First is that the original documentation should be presented unless it be shown that it was beyond the ability of the appellant to do so.
15. If so, alternative ways of proving the identity would be considered.
16. The decision notice was issued on 3rd October 2017 and the hearing itself almost a year later on 22nd August 2018. The decision letter set out in the clearest possible terms what was expected of the appellant and that was not done as was indicated by the Judge. Contact between solicitors could have been established either to obtain physical possession of the passport or at the very least that the wife’s solicitors could have duly certified the original passport as a true copy. No attempt was made to do that. It may well be that the attitude of the wife may have been such that it would

have been a futile exercise but it is difficult to argue when the obvious steps were not taken.

17. Ms Vencatachellum indicated that an email had been sent to the solicitors on 11th February of this year to which no response had been made. Once again, the appeal was determined on 22nd August 2018 and there had been a number of months in which those enquiries could have been made.
18. I recognise in fairness to the appellant that it is a narrow point and it is perhaps unfortunate that it has occupied much court time in hearing the matter. As I have indicated, an obvious course of conduct was suggested to the appellant by the respondent which was not in effect conducted.
19. I found that nothing unlawful or unreasonable in what the Judge had to say on the issue and accordingly this appeal is dismissed.
20. I simply express the hope that common-sense will prevail as between the two parties and that the appellant carry out the enquiries that have been asked of him and that the respondent thereafter can verify the identity if need be by other means. This seems to be the only point and the limited point and it would be unfortunate to incur further court time in litigating a matter which seems on its face to be well able to be resolved with cooperation on both sides.

Decision

The appeal before the Upper Tribunal is dismissed. The First-tier decision shall stand namely that the appeal in respect of the EEA decision is dismissed.

No anonymity direction is made.

Signed

Date 5th March 2019



Upper Tribunal Judge King TD